IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-44

BARNES & TUCKER COMPANY,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT.

Barnes & Tucker Company asks this court to note jurisdiction to review the judgment of the Supreme Court of Pennsylvania entered in the above case on February 28, 1977.[1]

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1. The Supreme Court of Pennsylvania had entered an earlier decision in this case which remanded the cause to the Commonwealth Court. Although the Supreme Court's decision did conclude certain issues against appellant, Barnes & Tucker did not then take an appeal to this Court because it might still have prevailed on the merits upon the remand to the Commonwealth Court. The entire cause having now been resolved, the earlier judgment of the Supreme Court of Pennsylvania may be treated as merged into the final judgment with respect to which review is here sought. *See, e.g.*, **Urie v. Thompson,** 337 U. S. 163 (1949).

OPINIONS BELOW.

The final opinion of the Supreme Court of Pennsylvania (**"Barnes & Tucker (II)"**) (A117-A130) [2] is reported at — Pa. —, 371 A. 2d 461 (1977). The opinion of the Commonwealth Court of Pennsylvania upon remand ("the remand opinion") (A98-A116) is reported at 23 Pa. Commw. Ct. 496, 353 A. 2d 471 (1976). The initial opinion of the Supreme Court of Pennsylvania (**"Barnes and Tucker (I)"**) (A70-A97) is reported at 455 Pa. 392, 319 A. 2d 871 (1974). The opinion of the Commonwealth Court following the hearing on this case ("the trial opinion") (A10-A69) is reported at 9 Pa. Commw. Ct. 1, 303 A. 2d 544 (1973). The opinion of the Commonwealth Court on the motion for preliminary injunction ("the preliminary injunction opinion") (A1-A9) is reported at 1 Pa. Commw. Ct. 552 (1971).

JURISDICTION.

This case arose on an amended complaint in equity against appellant brought by the Commonwealth of Pennsylvania on its own behalf and on behalf of the Department of Environmental Resources pursuant to the **Pennsylvania Clean Streams Law,** 35 Pa. Stat. Ann. §§ 691.1-691.1001 (A131-A163).

Direct appeal to this Court is taken from the judgment of the Supreme Court of Pennsylvania affirming the order of the Commonwealth Court of Pennsylvania making permanent a mandatory injunction under sections 2, 12 and

2. References to "A" pages are to pages in the appendix to this statement. References in the form "R. —a" are to pages in the Reproduced Record before the Pennsylvania Supreme Court in its initial consideration of this case; and references in the form "R. —b" are to pages in the Supplemental Reproduced Record which was added to the record before the Pennsylvania Supreme Court in its review of the remand decision.

16 of the 1970 amendments to the **Pennsylvania Clean Streams Law, Act of July 31, 1970,** P. L. No. 222, §§ 2, 12, 16, 35 Pa. Stat. Ann. §§ 691.3, 691.315(d), 601(a); (A135, A151, A157). Appellant argued in the courts below that the 1970 amendments were unconstitutional insofar as they retroactively required mine operators who had ceased operation before the passage of the amendments to abate any natural post-mining discharge occurring after the effective date of the amendments.

The Supreme Court of Pennsylvania entered its judgment on February 28, 1977 and denied appellant's timely petitions for reargument on April 6, 1977. Notice of appeal, a copy of which is attached at A164-A166, was filed with the Prothonotary of the Supreme Court of Pennsylvania for the Middle District on June 30, 1977.

This Court has jurisdiction pursuant to 28 U. S. C. Section 1257(2).

This appeal lies because the highest court of the Commonwealth of Pennsylvania has sustained the abatement provisions of the **Act of July 31, 1970** against a challenge that they are unconstitutional as applied to those mine operators who had ceased operation before the effective date of that act. **Cohen v. California,** 403 U. S. 15 (1971); **Warren Trading Post Co. v. Arizona Tax Commission,** 380 U. S. 685 (1965); **Dahnke-Walker Milling Co. v. Bondurant,** 257 U. S. 282 (1921).

QUESTIONS PRESENTED.

1. Does not a state statute violate the Due Process Clause of the Fourteenth Amendment when, under the guise of police power regulation of present mining activities, it imposes upon the former operator of a closed and now valueless mine, which had been operated and sealed without fault, the perpetual duty to treat water emanating from that mine by a retroactive declaration based merely on the fact that the operator had formerly operated the mine?

2. Even assuming that a state legislature may impose such a duty upon a former mine operator with respect to drainage generated in the mine it had actually operated, does not the statute violate the Due Process and Equal Protection Clauses when it imposes a perpetual obligation to pump and treat water that flows into that mine from other, uphill mines—the largest of which continues to operate with the knowledge that its unpumped mine drainage flows into the downhill mines—when the result is that five-sixths of the water treated comes from those other mines.

3. Assuming that the Constitution prohibits the state legislature from imposing retroactively upon a faultless former mine operator the duty to treat post-mining discharges, may the state courts impose that retroactive duty upon the former mine operator on a new theory of common law public nuisance—based in large part upon the regulating statute—without violating the Due Process and Equal Protection Clauses?

STATUTE INVOLVED.

The pertinent provisions of the 1970 amendments to the **Pennsylvania Clean Streams Law** are as follows:

Section 2. Section 3 of the act is amended to read:

Section 3. Discharge of Sewage and Industrial Wastes Not a Natural Use.—The discharge of sewage or industrial waste or any **[noxious and deleterious substances]** *substance* into the waters of this Commonwealth, which **[is or may become inimical and injurious to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation]** *causes or contributes to pollution as herein defined or creates a danger of such pollution* is hereby declared not to be a reasonable or natural use of such waters, to be against public policy and to be a public nuisance.

* * *

Section 12. Sections 315 and 316 of the act, added August 23, 1965 (P. L. 372), are amended to read:

* * *

[(d) Any permit approving the drainage and disposal of industrial wastes from a coal mine and issued by the board prior to the effective date of this act shall be deemed to be a permit issued pursuant to this section. The permit shall be valid for one year from the effective date of this act or for such additional period as the board might allow. Nothing herein shall limit the board's power to modify, suspend, or revoke any such permit under the provisions of subsection

(c) of this section] *Operation of Mines.—(a) No person or municipality shall operate a mine or allow a discharge from a mine into the waters of the Commonwealth unless such operation or discharge is authorized by the rules and regulations of the board or such person or municipality has first obtained a permit from the department. Operation of the mine shall include preparatory work in connection with the opening or reopening of a mine, backfilling, sealing, and other closing procedures, and any other work done on land or water in connection with the mine. A discharge from a mine shall include a discharge which occurs after mining operations have ceased, provided that the mining operations were conducted subsequent to January 1, 1966, under circumstances requiring a permit from the Sanitary Water Board under the provisions of section 315(b) of this act as it existed under the amendatory act of August 23, 1965 (P. L. 372). The operation of any mine or the allowing of any discharge without a permit or contrary to the terms or conditions of a permit or contrary to the rules and regulations of the board, is hereby declared to be a nuisance. Whenever a permit is requested to be issued pursuant to this subsection, and such permit is requested for permission to operate any mining operations, the city, borough, incorporated town or township in which the operation is to be conducted shall be notified by registered mail of the request, at least ten days before the issuance of the permit or before a hearing on the issuance, whichever is first.*

• • •

Section 16. The title of Article VI and sections 601, 602, 605 and 609 of the act are amended to read:

ARTICLE VI
PROCEDURE AND ENFORCEMENT

Section 601. Abatement of **[Pollutions]** *Nuisances; Restraining Violations.—(a)* **[All pollutions hereinbefore declared to be nuisances or maintained contrary to the provisions of this act,]** *Any activity or condition declared by this act to be a nuisance,* shall be abatable in the manner **[now]** provided by law or equity for the abatement of public nuisances. In addition, suits to abate **[pollution of any of the waters of the Commonwealth]** *such nuisances or suits to restrain or prevent any violation of this act* may be instituted in equity or at law in the name of the Commonwealth upon relation of the Attorney General, or upon relation of any district attorney of any county, or upon relation of the solicitor of any municipality affected, after notice has first been served upon the Attorney General of the intention of the district attorney or solicitor to so proceed. Such proceedings may be prosecuted in the **[court of common pleas of Dauphin County]** *Commonwealth Court,* or in the court of common pleas of the county where the **[nuisance has been committed, or of any county through which or along the borders of which flows the water into which such pollution has been discharged at any point above]** *activity has taken place, the condition exists, or the public affected,* and to that end jurisdiction is hereby conferred in law and equity upon such courts: Provided, however, That no action shall be brought by such district attorney or solicitor against any municipality discharging sewage under a permit of the board heretofore issued or hereafter issued under this act: And provided further, That, except in cases of emergency where, in the opinion

> of the court, the exigencies of the cases require immediate abatement of said nuisances, the court may, in its decree, fix a reasonable time during which the person or municipality responsible for the nuisances may make provision for the abatement of the same.

The entire Act of July 31, 1970, P. L. 222, is reprinted in the appendix hereto at pages A131-A163.

STATEMENT OF THE CASE.

The Facts of the Case.

Appellant is the former operator of Mine No. 15, a self-contained deep bituminous coal mine located, along with several other independently owned mines, in an area of Pennsylvania known as the Barnesboro Basin, under mineral leases covering the "mineable" and "merchantable" coal in that mine.[3] Most of the mine's approximately 6,600 acres are located in the lowest part of the Basin (9 Pa. Commw. Ct. at 4-5, 303 A. 2d at 545-46; A11-A12).

Mine No. 15 was first operated in 1916 and continued under several different operators until being taken over by appellant in 1939 (9 Pa. Commw. Ct. at 5-6, 303 A. 2d at 546; A12-A13). The trial court found, and the court below accepted, that there is "no credible evidence in this case that Mine No. 15 was not operated and eventually closed consistent with statutory law, regulation or licenses pursuant thereto." (9 Pa. Commw. Ct. at 58, 303 A. 2d at 572; A65).[4] For the twenty-one years before the mine was closed, the state had required drainage permits, and appellant had obtained them. These permits never imposed a duty on appellant to make provision for post-mining discharge or, indeed, to treat discharge which occurred during and as a result of mining operations. Until passage of the 1965 amendments to the **Clean Streams Law**, Pennsylvania law did not proscribe, and appellant's mining per-

3. While there were neither evidence nor findings of Barnes & Tucker's continuing property interest in Mine No. 15, the Commonwealth itself has treated Barnes & Tucker as generally having had only a limited sub-surface interest. Brief for Appellant in the Supreme Court of Pennsylvania at No. 20, May Term 1974 (**Barnes & Tucker (I)**), Appendix B.

4. In its initial decision in this case, the Pennsylvania Supreme Court found to be "supported by the record" and, therefore, binding upon it, the Commonwealth Court's factual findings. (455 Pa. at 404, 319 A. 2d at 878; A81).

mits specifically authorized, the discharge of acid mine drainage without treatment into already polluted streams (9 Pa. Commw. Ct. at 8-10, 303 A. 2d at 547-48; A15-A17).

In 1965, the Pennsylvania legislature amended that state's **Clean Streams Law** to regulate for the first time the discharge of mine drainage into polluted streams. Those amendments, however, related only to discharge from the operation of a mine, and not to post-mining discharge. 35 Pa. Stat. Ann. §§ 691.1, 691.307, 691.315. Although the amendments contained language which may have justified the issuance of permits conditioned on making provision for the treatment of post-mining discharge, no such condition was contained in any permit issued for Mine No. 15.

The evidence was not disputed that, had Mine No. 15's operators been able to anticipate a future liability for post-mining drainage, they could and would have employed different mining techniques (R. 1012a-14a; 1082a-84a; 1145a(52)-(53)). It was equally clear that the mining after the 1965 amendments was not the cause of the post-mining discharge (9 Pa. Commw. Ct. at 7, 303 A. 2d at 547; A14).

There was still mineable coal in areas of Mine No. 15 on May 10, 1969, when appellant ceased to operate the mine because "it could not economically afford to pump and treat the water that it would have to pump from the mine to continue to operate the mine." [5]

5. The Commonwealth Court did not determine whether appellant had conducted its post-January 1, 1966 winding down operations pursuant to a statutorily authorized extension of its earlier permit or under a new permit granted after the effective date of the 1965 Amendments, and the Supreme Court held the distinction to be immaterial. (455 Pa. at 409-10, 319 A. 2d at 880-81; A86-A87). However, the Commonwealth Court did find that the last two extensions of time granted as to the original permit were issued with full knowledge that Barnes & Tucker was then in the process of discontinuing the operation of Mine No. 15, and that

The sealing of Mine No. 15 was completed in accordance with the requirements of the Department of Mines and Mineral Industries of the Commonwealth which, at that time, required the exclusive use of an air seal or one which "will allow water to flow out of the mine. . . ." (9 Pa. Commw. Ct. at 8, 303 A. 2d at 547; A15). See Section 2(2) of the **Coal Mine Sealing Act of 1947, Act of June 30, 1947,** P. L. 1177, 52 P. S. § 28.2(2).

In late June, 1970, almost a year after it had been sealed, an acid discharge was discovered breaking through the ground at the northeastern end of the mine, caused by the rising waters in the mine. After several attempts to relieve the discharge, appellant reopened a pumping facility at Duman Dam, at the southwest end of the mine and installed facilities there to treat the mine drainage. The Duman Dam facility was, and still is, operated to bring the water level in Mine No. 15 below the breakout areas at the northeast end of the mine (9 Commw. Ct. 19-24, 303 A. 2d at 552-55; A26-A32). Because of the large volume of water presently flowing into and accumulating in Mine No. 15, it is now impossible to seal it perfectly from adjoining mines or to seal it against a possible breakout (23 Pa. Commw. Ct. at 502, 353 A. 2d at 474-75; A102-A103).

Of the 7.2 million gallons of water accumulating in Mine No. 15 which must be pumped and treated each day in order to prevent a renewed breakout of acid drainage, six million gallons are attributable to the influx of fugitive waters generated in adjacent mines. (**Barnes & Tucker (II),** 371 A. 2d at 465; A124-A125). The trial court

5. (Cont'd.)
the Commonwealth was possessed of sufficient information at that time to assure, in its grant and conditioning of authority, that the statutory law and regulations then in effect would be fully complied with, yet did not impose any post-mining treatment responsibilities upon appellant (9 Pa. Commw. Ct. at 16, 18-19, 303 A. 2d at 551, 552; A23-A24, A25-A26).

did not attempt to allocate the six million gallons per day of fugitive inflow into Mine No. 15 among the neighboring mines in the complex. Nevertheless, it did find that the still actively operating Colver Mine, which on May 23, 1966 had been discharging 9.48 million gallons per day, was, by the time of trial, discharging "over 6 million gallons per day less than the earlier date, at a time when less mining and pillaring had been done in the mine." (23 Pa. Commw. Ct. at 507, 353 A. 2d at 477; A108). That is, the Colver Mine had reduced its pumping to some three or three and one-half million gallons per day. Moreover, the Commonwealth Court found that Colver's termination of pumping had resulted in the accumulation of a three billion gallon pool pressing against the lower barrier of the Colver Mine where it abuts Mine No. 15 with a head of water of between 178 and 200 feet at the time of trial (*Id.*).[6]

Although the trial court found that substantially less water would need to be pumped to prevent a breakout were it not for the influx of fugitive waters, it made no finding as to whether or not the outbreak would have occurred without that influx (23 Pa. Commw. Ct. at 508, 353 A. 2d at 478; A109), despite the fact that appellant presented substantial testimony that it would not have (R. 1108a-12a; 1114a-15a; see R. 639a, 646a, 1108a-09a). In any case, the trial court found that the only way to prevent future outbreaks, now and for the foreseeable future, would be to pump and treat 7.2 million gallons of water per day, five-sixths of which originates in mines over which appellant never has had any control whatsoever, at a present monthly cost of between $30,000 and $50,000, which duty and cost both the trial court and the court below imposed on appellant (23 Pa. Commw. at 508, 353 A. 2d at 478; A109-A110).

6. While the Commonwealth Court noted the expectation of the Colver Mine owners at the time a decision was made to reduce pumping that the excess drainage would flow into the Sterling Mine Complex, the quantity of sandstone in the area, "which would act like a pipeline for the transference of mine water," and the existence of cut throughs, pillarings and breached barriers between the Colver and Sterling Mines and Mine No. 15 would make it inevitable that a substantial portion of this drainage would find its way into Mine No. 15 (23 Pa. Commw. Ct. at 505-07, 353 A. 2d at 476-477; A106-A109).

The Preliminary Injunction Opinion.

After the breakout, appellant's existing pumps at Duman Dam had been modified to provide for treatment of acid drainage and reopened under a stipulation between appellant and the Commonwealth on August 26, 1970. When the agreement between the parties concerning the operation of the treatment facilities broke down, the question of discharge from Mine No. 15 was presented to the Honorable James Bowman of the Commonwealth Court in a preliminary injunction proceeding. On April 13, 1971, President Judge Bowman issued a preliminary mandatory injunction under which appellant was required to operate the Duman Dam treatment facilities and appellant and the Commonwealth were required to split the cost of that operation, all pending the resolution of the legal question of who should pay the treatment costs. 1 Pa. Commw. Ct. at 560-61; A8-A9.

From the time of the Commonwealth Court's preliminary injunction, which determined that the discharge from the mines in the Barnesboro Basin produced substantial additional pollution in the waters of Pennsylvania, to the present, there has been no question that the Duman Dam treatment facility should and will be operated. The question is, as it has been, one of who should pay for the cost of that operation. The Commonwealth has insisted, and the courts below have eventually decided that, under the 1970 amendments to the **Clean Streams Law,** the

burden should fall on appellant. Appellant urges that the burden is on the Commonwealth to treat the discharge from Mine No. 15, as from most other mines abandoned prior to the 1970 law, and that the Constitution prohibits the Commonwealth from shifting that burden onto appellant merely because it was the last operator of Mine No. 15.

The Trial Decision.

After twelve days of hearings, and upon a record of 1400 pages of testimony and more than 250 exhibits, the Commonwealth Court rejected every one of the four different legal theories proposed by the Commonwealth as a basis upon which to issue a permanent injunction compelling appellant to treat post-mining acid drainage from Mine No. 15 until such time, if ever, that the water achieved prescribed quality standards.

After dispensing with two arguments not here in issue, the court refused to find that the Commonwealth had stated a cause of action for either statutory or common law nuisance. With respect to the first, it held that the drainage from Mine No. 15 did not constitute a nuisance under the **Clean Streams Law** "as then in effect." (9 Pa. Commw. Ct. at 60, 47, 303 A. 2d at 572, 566; A67). As to the existence of a common law nuisance, the court concluded (9 Pa. Commw. Ct. at 58-59, 303 A. 2d at 572; A66):

> "Considering the legislative history, the lawful operation and closure of Mine No. 15 at all times and the other salient facts of this case, we cannot today declare—solely for the reason that B & T and its predecessors created a subsurface artificial condition by reason of mining—that a breakout of mine water through the forces of nature at work adjunctive to said artificial condition constitutes a public nuisance for which B & T is responsible today."

Barnes & Tucker (I).

The Pennsylvania Supreme Court accepted the trial court's findings of fact (455 Pa. at 404, 319 A. 2d at 878; A81), and agreed with its conclusions of law as to two of the Commonwealth's two theories of liability. However, it found that relief could be granted on the basis of either statutory or common law nuisance. The court first declared a statutory remedy to be available under the 1970 amendments to the **Clean Streams Law,** which were adopted after appellant had abandoned Mine No. 15 (455 Pa. at 409-10, 319 A. 2d at 880-81; A85-A87), holding that its action did not give the 1970 amendments retroactive effect since, *inter alia,* the condition sought to be abated, if not the acts which caused it, occurred after the amendments (455 Pa. at 417-18; 319 A. 2d at 884-85; A94-A95).[7] In the alternative, it held that liability could be premised on a finding of common law public nuisance despite the "absence of facts supporting concepts of negligence, foreseeability or unlawful conduct." (455 Pa. at 414, 319 A. 2d at 883; A91).

Nonetheless, the Court recognized that under the rule of **Lawton v. Steele,** 152 U. S. 133 (1894), the imposition of liability upon appellant might still weigh so oppressively and so exceed the parameters of reason as to constitute a "taking of property." (455 Pa. at 418-19, 319 A. 2d at 885; A95-A96). Accordingly, it remanded the cause to the Commonwealth Court to determine, first, the precise nature of relief which would be warranted and second, whether the imposition of such relief would be within constitutional limits.

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7. The court assumed that the 1970 Amendments were applicable only to "those post-mining discharges where mining operations have occurred subsequent to January 1, 1966, under conditions requiring a permit pursuant to Section 315(b) of the 1965 law . . . ," but rejected appellant's contention that its operations conducted pursuant to an extended pre-1965 permit did not satisfy this condition (455 Pa. at 409-10, 319 A. 2d at 880-81; A86-A87).

The Remand Decision.

Addressing itself to the first remand issue, the Commonwealth Court found that, in order to prevent an outbreak of acid drainage, it would be necessary to pump from the mine and to treat approximately 7.2 million gallons of water per day for the indefinite future, at a cost of between $30,000 and $50,000 per month (23 Pa. Commw. Ct. at 502, 508, 353 A. 2d at 474-75, 478; A103, A109-A110).

The court then proceeded to consider "whether the only abatement relief order that can be fashioned by this Court would equate an unconstitutional taking of property of appellant or be beyond the 'parameters of reason' . . . ." (23 Pa. Commw. Ct. at 503, 353 A. 2d at 475; A103). In holding that it would not, the court relied on the theory that because appellant did not introduce evidence of its general "capital structure, assets and liabilities or its profits or losses," it had failed *a priori* to sustain its burden of showing the order to be unduly oppressive or unreasonable in constitutional terms (23 Pa. Commw. Ct. at 511-12, 353 A. 2d at 480; A113).

Despite its factual finding that, of the 7.2 million gallons of water per day which appellant would have to pump and treat, only "approximately 1.2 million gallons per day are attributable to water generated in Mine No. 15 while approximately six million gallons per day are attributable to fugitive mine water generated in other mines in the complex and finding its way into Mine No. 15," 23 Pa. Commw. Ct. at 508, 353 A. 2d at 478; A109, the court held that, despite the magnitude of the liability imposed upon appellant, the absence of proof that appellant's activities were the proximate cause of the discharge did not even raise an issue of constitutional dimensions (23 Pa. Commw. Ct. at 509-10, 353 A. 2d at 478-79; A110-A112).

Barnes & Tucker (II).

In affirming the Commonwealth Court's conclusion that the remedy imposed was not unconstitutional, the court below rejected out of hand appellant's argument that, since the economic effects of Pennsylvania's environmental legislation had already driven appellant's mine out of business, the imposition in addition of an affirmative duty to pump and treat drainage from that mine constituted an unconstitutional taking (371 A. 2d at 464; A123).

Moreover, instead of concentrating on the constitutional question it had framed in **Barnes & Tucker (I)**, that is, "whether the Commonwealth's [otherwise valid] use of such power in this case would be unduly oppressive upon Barnes and Tucker . . . ." (455 Pa. at 419, 319 A. 2d at 886; A97), the court devoted the greatest part of its opinion to the question of whether the method chosen by the Commonwealth to abate a declared nuisance constituted a reasonable exercise of the police power, a question presumably already decided in favor of the Commonwealth in its earlier opinion (*id.* at 418-19, 319 A. 2d at 885-86; A96). Indeed, the court considered appellant's due process arguments in the context of a holding that since it had found the Commonwealth to be "validly employing its police power in a reasonable manner to abate the immediate public nuisance, there can be no finding of an unconstitutional 'taking' by the imposition of the present abatement order, despite the impact this exercise of the police power may have on appellant" (371 A. 2d at 467; A128).

Again, the court below was not swayed by appellant's argument that it was unduly oppressive to require it to treat water originating largely in unowned, adjacent independent mines, because it found that statute to be

directed, not to the source of the polluted water itself, but to the source of the discharge (371 A. 2d at 466; A126-A127). Finally, the court "noted" appellant's failure to adduce additional evidence that there was an alternative means of abating the nuisance or that the remedy imposed was "unduly oppressive due to its economic impact" (371 A. 2d at 468; A129), without discussing appellant's contention that there was already evidence in the record sufficient to establish an unconstitutional taking.

THE ISSUES ARE SUBSTANTIAL.

The present appeal brings before this Court the increasingly critical conflict between the efforts of the states to impose upon users of land the duty to restore the environment and the constitutional limitations on the right of state governments to impose upon their citizens burdens so great that they constitute a taking of property without just compensation, an issue which is particularly sharply focused when, as here, the state seeks to apply its environmental legislation retroactively.

It first raises the question of whether a state statute violates the Due Process Clause of the Fourteenth Amendment when it imposes potentially limitless liability without fault upon appellant, the former operator under mineral leases of an abandoned coal mine, for unforeseeable post-mining acid discharge from that closed mine. More specifically, it asks reversal of the decision of the Supreme Court of Pennsylvania that the 1970 amendments to the **Clean Streams Law** do not affect a "taking" prohibited by the Due Process Clause when they retroactively imposed a perpetual duty upon appellant, the former mine operator, to pump and treat water from its former mine, at a cost of $360,000 to $600,000 per year, despite the facts accepted by the court below that: (1) appellant had operated that mine at all times lawfully, without negligence and, for the twenty-one years before abandonment, in accordance with drainage permits issued by the state, (2) these permits had expressly authorized discharge of mine drainage without treatment and contained no requirement that appellant pump or treat post-mining drainage, (3) appellant abandoned and sealed the mine in accordance with the only method permitted by state law, a method intentionally designed by the state to allow post-mining discharges should water accumulate in the sealed mine,

(4) appellant had abandoned that mine because newly enacted environmental regulations made it economically unfeasible for appellant to remove the coal still left in the ground, (5) appellant has no interest in its former mine against which to charge the cost of pumping and treating that mine discharge, (6) there is no way that appellant can now seal the mine to prevent the natural discharge of mine water, (7) that discharge broke out from an area near the surface which had been mined by a previous operator before appellant had obtained any interest in the now abandoned mine and (8) at the time it abandoned and sealed that mine, appellant could not have foreseen that a post-mining discharge would occur.

Second, this appeal raises the question of whether the state legislature did not violate both the Due Process and the Equal Protection Clauses of the Fourteenth Amendment when it imposed upon appellant sole responsibility for the pumping and treatment of drainage from appellant's former mine despite a finding that five-sixths of that drainage was generated in mines in which appellant had no interest and over which it had no control. More explicitly, it asks whether the state may cause appellant to pump and treat 7.2 million gallons of mine water daily when six million gallons of that water flow into appellant's former mine from other abandoned mines and from an active uphill mine whose owner and operator, faced with the same environmental requirements which caused appellant to abandon its mine, chose to decrease their own pumping activity and to allow a three billion gallon pool of mine water to accumulate against the barrier between their mine and appellant's and other abandoned mines, with the knowledge that this accumulated water would flow into appellant's or other connecting mines.

The burden which has been imposed upon appellant by the retroactive provisions of the 1970 amendments to

Pennsylvania's Clean Streams Law as authoritatively interpreted by the Supreme Court of Pennsylvania is unprecedented both in nature and in scope. The basis for this appeal is that if there exist any circumstances under which purely economic state regulation enacted under the police power will be found to exceed constitutional limits, those circumstances are present in this case and demand reversal of the order of the court below.

1. This Case Presents an Unwarranted and Unprecedented Ruling That a State Does Not Take Property in Violation of the Due Process Clause of the Fourteenth Amendment When That State Regulates a Citizen's Property in a Fashion That Gives It a Substantial Negative Value Despite the Fact That That Citizen Neither Is Presently Using That Property Nor Ever Used It Unlawfully.

Only in 1970, after appellant had abandoned and sealed Mine No. 15 in accordance with all applicable regulations, did Pennsylvania enact the legislation here challenged, which made post-mining discharge a public nuisance and required mine operators to make provision for the treatment of post-mining discharge. That legislation, however, was made applicable not merely to mines which continued to operate after the date of the 1970 legislation, but also to any mine which had operated within permit requirements after January 1, 1966.

Some months after the 1970 legislation, a natural breakout of drainage from Mine No. 15 occurred. It is to prevent a recurrence of this natural breakout—and not to permit the operation of Mine No. 15—that the courts below imposed upon appellant the duty to pump and treat 7.2 million gallons of water daily from Mine No. 15 at an annual cost of $360,000 to $600,000. It is undisputed that

there is no foreseeable end to the duty to pump and treat this water and that appellant neither gains any benefit from the pumping and treatment nor has any other way to recoup its costs from Mine No. 15.

In order to justify the application of the 1970 legislation to appellant against the challenge that the state was retroactively imposing a duty upon appellant, the court below concluded that the state was seeking to regulate not past conduct, but the present discharge from Mine No. 15. Similarly, the court developed a novel theory of nuisance law, based largely on the 1970 amendments, which held that a former mine operator could be liable for post-mining discharges despite both the fact that the mining had been done under state-issued permits which required no water treatment during or after mining and at a time when no law required such treatment and the further fact the discharges were not related to any present mining activity. Indeed, the court seems to argue that the very need for and existence of the unconditional permits were evidence that the mine drainage had been recognized as a public nuisance.

Appellant readily concedes that the state has the right to regulate discharges related to an active mining operation. If an operator wishes to continue mining he must pay the environmental costs. If he cannot afford to pay the costs, he may have to abandon his operations. Moreover the state may impose on a current operator the duty to make provision for the treatment of post-mining discharge. Once again, the operator can avoid the duty by abandoning the operation on or before the effective date of the statute imposing the new duty. The state may impose on former operators the duty to treat post-mining discharge when the former operator has operated his mine negligently or in violation of law. The state even has the right to go upon a former operator's property to seal a

breakout or to pump and treat a discharge from an abandoned mine.

What the state may not do without running afoul of the Due Process Clause, however, and what the court below has permitted Pennsylvania to do in this case, is to impose retroactively upon a former mine operator a duty to treat mine drainage even, in the court's own words, in "the absence of facts supporting concepts of negligence, foreseeability or unlawful conduct." (**Barnes & Tucker (I)**, 455 Pa. at 414, 319 A. 2d at 883; (A91).

The reason is obvious. If the state gives advance warning of the environmental rules of the game, the would-be mine operator can decide in advance whether to open a coal mine, and how. He can determine whether the potential profits from a mine will repay the restoration costs. He may leave more coal in place as barriers to prevent future breakouts and may seal his mine better from those of his neighbors. But, by the time the 1965 amendments were adopted, it was already too late for appellant—or its predecessors—to plan to develop Mine No. 15 in a way that would prevent post-mining discharge. Indeed, as the trial court found, it would not have prevented the breakout if appellant had not mined one ton of coal after the 1965 Act. And it was not even the 1965 amendments, but the 1970 amendments, enacted after Mine No. 15 was closed and sealed, which impose upon appellant the duty to treat post-mining discharge.

The 1970 amendments were made retroactive more than four and one-half years. Mine operators were finally warned on July 31, 1970 that from January 1, 1966 they had mined at their peril of treating post-mining discharges whether or not the state had imposed that requirement in the permits it had issued them. And if it is constitutional for the legislature to impose this burden on mines which closed between 1966 and 1970, why not equally on those

which ceased operation between 1945 and 1965—or even earlier? There is no bar but the grace of the legislature if the Constitution does not protect against retroactive regulation.

Moreover, if the burden of treating post-mining discharges from Mine No. 15 is imposed on appellant rather than the Commonwealth, appellant cannot go back to the customers who bought coal from that mine and collect a higher price for that coal to cover the previously unforeseen costs of operating the Duman Dam treatment facility in perpetuity. Unless the Commonwealth bears the cost of the treatment facility that burden will fall permanently and completely on appellant.

In determining that the imposition on appellant of this perpetual duty to pump and treat water from Mine No. 15 did not constitute an unconstitutional taking, the Pennsylvania Supreme Court announced a theory of law in direct opposition to numerous decisions of this Court: "given our determination that the Commonwealth is validly employing its police power in a reasonable manner to abate the immediate public nuisance, there can be no finding of an unconstitutional 'taking' . . . despite the impact this exercise of the police power may have on appellant." (**Barnes & Tucker (II)**, 371 A. 2d at 467; A128).[8]

This Court has always held that a police power regulation, no matter how useful or necessary, may become a taking in extreme circumstances. The leading case is **Pennsylvania Coal Co. v. Mahon,** 260 U. S. 393 (1922). In that case, the Court recognized that the police power normally operates as an implied limitation on the use of

8. In this context, the finding of the court below that the state was using its police power "in a reasonable manner" plainly looks to the court's determination that pumping and treatment at Duman Dam were necessary to prevent the undesirable acid discharge, not that the costs were not unduly burdensome on appellant. To read this phrase otherwise would be to make it assume its conclusion.

private property, but held, in striking down the regulation there involved, that when the burden on private property "reaches a certain magnitude, in most if not all cases, there must be an exercise of eminent domain and compensation to sustain the act." *Id.* at 413. Justice Holmes' warning in 1922 was prophetic: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 416.

The Court in **Mahon** did not attempt to quantify the exact point where compensation becomes due, but held only that the limits of the police power have been breached where there is a total confiscation of property value.[9] No uniform rule has since been established; however, it is still true, as noted in **Queenside Hills Realty Co. v. Saxl,** 328 U. S. 80, 83 (1946), that the "extreme cases," the cases which mark the furthest reach of the police power, involve the prohibition only of certain uses of property, albeit the most profitable, and do not involve the destruction of all property value. *See, e.g.*, **Hadacheck v. Sebastian,** 239 U. S. 394 (1915) (prohibiting brickmaking within portion of city); **Reinman v. Little Rock,** 237 U. S. 171 (1915) (prohibiting operation of livery stable within city); **Pierce Oil Corp. v. City of Hope,** 248 U. S. 498 (1919) (prohibiting storage of gasoline in proximity to dwellings).

In its most recent decision in this area, in **Goldblatt v. Town of Hempstead,** 369 U. S. 590 (1962), this Court again found it unnecessary to determine exactly "where regulation ends and taking begins," *id.* at 594, because there was no evidence to suggest that the regulation in that case

9. Noting that "the right to coal consists in the right to mine it," this Court held in **Mahon** that "[t]o make it commercially impractical to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." 260 U. S. at 414.

which prohibited further excavation from a portion of a gravel pit would even reduce the value of petitioner Goldblatt's property. Nonetheless, the Court again recognized that there was a point at which governmental action in the form of otherwise valid regulation might be "so onerous as to constitute a taking which constitutionally requires compensation." 369 U. S. at 594. Parenthetically, the Court never reached the question of whether that part of the ordinance which required Goldblatt to refill his worked-out gravel pit—the portion most nearly resembling the burden imposed on appellant here—was unconstitutional, since that provision was not before the Court. 369 U. S. at 597-98.

In each of these cases, the Court was faced with the question of whether the regulation was so burdensome that it constituted an actual taking of property. Except in **Mahon,** none of the property owners was able to show that the value of his property had been totally destroyed. No such difficulty exists, however, in this case.

Appellant is merely the former operator of an abandoned coal mine under mineral leases. There is no other use for these leases but the mining of coal. In this case, appellant had given up its mining operations because "it could not economically afford to pump and treat the water that it would have had to pump from the mine to continue to operate the mine." (9 Pa. Commw. Ct. at 7, 303 A. 2d at 547; A14). Thus, the property was plainly without any value before the state undertook to impose upon it regulations which would make it cost its former operator $360,000 to $600,000 per year in perpetuity. In other words, this case goes beyond any case ever presented to this Court in that the state action here involved does not merely totally destroy the value of appellant's property, it makes that property a perpetual expense to appellant. And it does not do so under a theory based on fault, because there was none; rather, it does so under the guise of a police power regulation.

This Court in **Mahon** held that an unconstitutional taking may occur when state regulation destroys the economic value of a property. How much more so when that regulation imposes a negative worth upon a property so that its holder cannot even abandon that property to the state as if there had been a taking.[10]

It is in accord with the purpose of regulation to require that each economic enterprise bear its own costs and that, if the cost associated with a particular use, properly regulated, is too great, then that use should be abandoned. However, this is the limit of justifiable economic regulation. Thus, in **Erie Railroad Co. v. Board of Public Utility**

10. The court below did not address itself to any discussion of the economic impact of the regulation in this case upon appellant, simply rejecting out of hand appellant's argument that the state cannot impose a positive burden on a property whose value had already been destroyed by that regulation, 371 A. 2d at 464; A123, and noting that appellant had not offered additional evidence that the regulation "was unduly oppressive due to its economic impact," *id.* at 468; A129.

The trial court, by contrast to the court below, based its refusal to find a "taking" on appellant's failure to introduce evidence "of its capital structure, assets and liabilities or its profits or losses, if any." 23 Pa. Commw. Ct. at 512, 353 A. 2d at 480; A113. The court refused to find a taking merely based on the cost of the Duman Dam pumping and treating operation, arguing that appellant would be thus "effectively isolating this cost from the relative economic impact thereof upon its corporate assets and profits." *Id.*; A114. Yet this is precisely what is involved in eminent domain cases where there is an actual taking. A state must compensate the owner of condemned property regardless of his other assets. Certainly the same rule applies to a regulation which destroys a citizen's property. It is an unconstitutional taking whether or not the victim of the taking has other assets from which he can recover his losses or, in this case, pay the charges against the regulated property. Appellant need not wait until these charges have destroyed any other assets it may have before it can seek redress from the regulation here involved. *Cf.* **Union Oil Co. v. Morton,** 512 F. 2d 743 (9th Cir. 1975) (regulation prohibiting construction of one of three drilling platforms on oil lease constituted taking).

Commissioners, 254 U. S. 394, 411 (1921), the Court, again by Justice Holmes, upheld a law requiring the railroad to eliminate grade crossings at its own expense upon the rationale that "[i]f the burdens imposed are so great that the road cannot be run at a profit it can stop, whatever the misfortunes the stopping may produce." Similarly, this Court has countenanced police power restrictions on certain uses of property on the basis that " '[s]uch legislation does not disturb the owner in the control or use of his property for lawful purposes, *nor restrict his right to dispose of it.* . . .' " (Emphasis supplied). **Goldblatt** *supra,* 369 U. S. at 592-93, quoting from **Mugler v. Kansas,** 123 U. S. 623, 668-69 (1887).

Barnes & Tucker has plainly been deprived of the right to dispose of its property because, as a result of Pennsylvania's actions, that property is not only commercially without value, it is encumbered in perpetuity with some half a million dollars per year in costs. The lower court, however, sidestepped appellant's argument that it was being subjected to an unprecedented affirmative burden simply by noting that it would "nullify" the Commonwealth's environmental policy if Barnes & Tucker could "avert responsibility for abating a nuisance which it created under the proposition that it may abandon its enterprise, rather than operate such enterprise within the parameters of the environmental regulations. . . ." (**Barnes & Tucker (II),** 371 A. 2d at 467; A127-A128).

While a state regulation need not permit businessmen to charge forward the known costs of regulation and then simply to walk away from the business when these accounts fell due, plainly a different rule is required where all the activity which gave rise to the present condition is totally lawful "past conduct which obviously cannot now be abated," (**Barnes & Tucker (I),** 455 Pa. at 419, 319 A. 2d at 885; A96), and where there is a total absence of "facts

supporting concepts of negligence, foreseeability or unlawful conduct." (*Id.* at 414, 319 A. 2d at 883; A91).

Finally, **Usery v. Turner Elkhorn Mining Co.,** 428 U. S. 1 (1976), cited in passing by the court below, does not serve to bridge the constitutional gap. The statute compensating victims of "black lung" disease upheld in **Turner Elkhorn** did involve a retrospective element insofar as it imposed upon mine operators liability for harm suffered by miners who had left employment in the industry before the effective date of the Act. However, unlike the instant case, liability was limited in **Turner Elkhorn** to present mine operators, and merely was extended to include certain specific claims of past employees. Significantly, the measure was upheld on the theory that this was a rational means of spreading the costs of past mine working conditions to those who had profited thereby—both the coal consumers and the industry. 428 U. S. at 18.

While the scope of the statutory scheme upheld in **Turner Elkhorn** is clearly distinguishable from that imposed upon appellant in that it was imposed only upon the working industry where it could be passed on in the price of present production, **Turner Elkhorn** is nonetheless instructive insofar as it sheds light on the magnitude of affirmative regulation which will stand up under the more stringent due process test applicable to retrospective legislation.

Obviously, the burden imposed upon operators under the Black Lung Benefits Act is insubstantial as compared to that involved here. By providing that the federal government rather than individual operators would be liable upon claims filed during an initial three year period, and by requiring that claims were to be filed within three years of discovery, not only did the legislature relieve the operators almost entirely of liability for claims maturing before enactment of their responsibilities, see 428 U. S. at

16, n. 14 and associated text, the Act also evidenced its intent that the federal government would assume responsibility for "those cases which form the backlog of claims—both those which have been denied previously and those which are newly covered under the amendments to the law. . . ." S. Rep. No. 92-743, 92d Cong., 2d Sess., reprinted in [1972] U. S. Code Cong. and Ad. News, 2305, 2324.[11]

Moreover, since the breakout of mine drainage in this case occurred from a portion of Mine No. 15 which had been mined before appellant had any interest in it, there is no conceivable constitutional justification for imposing pumping and treatment costs upon appellant. At the time appellant began operation of Mine No. 15, there was no way in which it could have anticipated that some twenty-five years later the state would make it liable for post-mining discharges and could, therefore, have avoided operating the mine or have attempted to make financial provision for future pumping and treatment costs.[12] Equally clearly, there was no way that appellant could have operated Mine No. 15 to prevent the breakout since

11. In any event, **Turner Elkhorn** involved only a "facial attack" upon the validity of the statute as a whole and not its application to a particular class of operators or factual circumstances. (See the decision of the district court reported as **Turner Elkhorn Mining Co. v. Brennan,** 385 F. Supp. 424, 426 (E. D. Ky. 1974).) Thus, the Court's decision in **Turner Elkhorn** would not preclude future challenges under the Black Lung Benefits Act of the kind involved here, *i.e.*, that even a statute or regulation which is not unconstitutional on every application may still be unconstitutional in its application to a particular class of mine operators. *See,* 428 U. S. 45, n. 9 (Powell, J., concurring).

12. Compare the Black Lung Benefits Act, 30 U. S. C. § 932 (c)(i), wherein the sole exception to the limitation of operators' liability for benefits for injuries arising, at least in part, from employment in a mine during the period he operated it is with respect to a new operator who, *after the effective date of the act, assumes liability* for benefits for which a prior operator would have been liable but for the transfer of the mine.

the mining near the surface, where the breakout occurred, had already been done. In other words, liability has been imposed on appellant without notice and with respect to a condition it could not prevent.

Thus, the Supreme Court of Pennsylvania in this case has proclaimed a doctrine which is unique to American constitutional jurisprudence in upholding a statute which makes appellant—and those similarly situated—liable for perpetual pumping and treatment of water from its abandoned mine even though it had no notice that it might have this liability at the time it conducted its mining operations, it conducted these operations and sealed the mine in accordance with the law without negligence or other fault, and it could not have foreseen that any deleterious post-mining discharge was likely to have occurred.

2. Even Assuming That the Court Below Correctly Held That Appellant Might Be Liable Without Fault or Foreseeability for Post-Mining Treatment of Water Generated in Its Own Former Mine, Certainly the Due Process and Equal Protection Clauses Prohibited That Court From Upholding Legislation Which Imposed Similar Liability With Respect to the Five-sixths of the Drainage Involved in This Case Which Flows Into Appellant's Former Mine From Neighboring Abandoned and Active Mines.

In its original appellate decision, the court below remanded the case to the trial court for a determination of whether the imposition upon appellant of a perpetual duty to pump and treat drainage from Mine No. 15 would constitute an unconstitutional taking. In so doing, the court stated:

> "The possibility of sealing and isolating Mine No. 15 so as to prevent future discharges may exist, but the feasibility of such relief was not directly ad-

dressed below. Much of the testimony below was concerning the mines adjacent to Mine No. 15, the barriers and cut throughs between them, the quantity and quality of water generated in each of the mines, the amount of fugitive water migrating into Mine No. 15, and whether, but for the fugitive waters, any discharge would occur at Mine No. 15. We believe a finding in regard to the sources of water being discharged from Mine No. 15 would be relevant in a determination of the appropriate relief. In this regard we note a key distinction from the situations present in Commonwealth v. Harmar Coal Co. and Commonwealth v. Pittsburgh Coal Co., 452 Pa. 77, 306 A. 2d 308 (1973). Those cases involved the pumping of water from abandoned mines in connection with the operation of working mines. In the present case we are essentially dealing with a natural discharge (but for the pumping at Duman Dam) from an abandoned mine which may include acid mine drainage which originated in adjacent abandoned mines." 455 Pa. at 419-20 n. 16, 319 A. 2d at 886 n. 16; A97 n. 16.

The trial court, in response to this direction, found not only that there was no feasible way to seal Mine No. 15, but that fully five-sixths of the water which must be pumped from that mine to prevent a future breakout and be treated was not generated in Mine No. 15 but flowed into that mine from other active and abandoned mines. 23 Pa. Commw. Ct. at 508, 353 A. 2d at 478; A109. The court below held that the record supported this finding. 371 A 2d at 465; A124-A125. Nevertheless, citing **Commonwealth v. Harmar Coal Co.,** 452 Pa. 77, 306 A. 2d 871 (1973), *appeal dismissed,* 415 U. S. 903 (1974), which held an active mine operator responsible for polluted drainage *it pumped* from an abandoned mine for the protection of its

operating mine, the court below affirmed the imposition of liability for treating the entire discharge on appellant on the ground that "it is not the source of the polluted water itself but the *source of the discharge* of the acid mine water into the waters of the Commonwealth with which we are presently concerned." 371 A. 2d at 466; A126-A127.

The extreme inequity of the result in this case is emphasized by the fact that, at the very time that Barnes & Tucker was forced to abandon Mine No. 15 because it could not be economically operated in accordance with the dramatic new requirements of the 1965 Amendments, the owners of the adjacent active Colver Mine decided to *decrease* their pumping and to permit the unpumped and untreated water to accumulate in the lower portion of the mine abutting Mine No. 15, where the combination of the natural geology and the existence of cut throughs, pillaring and breached barriers between the mines in the complex made it inevitable that a substantial portion of this drainage would ultimately migrate to Mine No. 15 (23 Pa. Commw. Ct. at 504-08, 353 A. 2d at 476-77; A108-A109). Accordingly, the result of the statutes upheld in this case is to impose upon petitioner, not merely the unanticipated costs of treating the discharge from Mine No. 15, but, in addition, costs properly attributable to a still active mining operation which continues thereby to avoid its share of those very same environmental costs which had previously forced appellant to abandon its operations.[13]

13. The final wrong of the imposition upon appellant of the cost of treating the drainage from the whole series of higher mines in the Barnesboro basin is that but for the decision of the court below refusing to allocate responsibility to the mines that generate the subsurface water, Pennsylvania would be responsible for treating the water generated in the Moss Creek and Sterling mine complexes since those mines were closed before January 1, 1966 and, accordingly, come within the state-funded clean-up provisions of the **Act of December 15, 1965,** P. L. 1075, 35 P. S. § 760.1 et seq.

Neither the Equal Protection Clause nor the Due Process Clause permits Pennsylvania to single out appellant from among the past and present mine operators in the Barnesboro basin and to impose upon it, merely because of a fortuity in geology, the burden of pumping and treating the mine drainage generated in all of the mines in that basin. If liability for treatment may be imposed without fault, it should certainly be apportioned among all of the former operators of abandoned mines. More important, the drainage from an active mine should certainly not have to be treated by the former operator of an abandoned mine to the benefit of the operator of the active mine.

This is not to suggest that mine drainage is not an important problem subject to solution under the police power. To the degree that appellant or any other mine operator pumps mine drainage in connection with its operations, it may be compelled to treat that drainage. To the degree that any operator operates a mine after notice that continued operation will entail a duty to treat post-mining drainage, that duty may be imposed upon that operator. But the desirability of finding an easy solution to the treatment of acid mine drainage does not justify the imposition upon a former mine operator of the duty to treat mine drainage which results primarily from the mining activity of others. When neither fault nor operation after notice that a burden of that operation is the treatment of post-mining drainage supports the imposition of those treatment costs on a mine operator, it is the state and not the operator who must pay the treatment costs.

The fact is that neither the public nor mine operators have, until recently, became aware of the possibility that the environment may be protected against various pollutants or the necessity of doing so. The desire to achieve

that protection has become a matter of great public concern with the common consequence that governments have felt compelled to do "whatever is necessary" to remedy what they view as an acceptable situation.

However, even the existence of a very pressing public need will not justify constitutional "shortcuts" which bypass individual rights. Nor does the fact that we can now identify the harm, which had previously been merely a hidden cost of other presumably great public needs, justify imposing upon a faultless person the burden of our collective ecological ignorance and lack of foresight. *Cf.*, **Berger, "A Policy Analysis of the Taking Problem"**, 49 N. Y. U. L. Rev. 165 (1974).

Unless this Court is now prepared to hold, as in effect the Pennsylvania Supreme Court did, that there is no longer any degree of private burden which cannot be justified in the name of the public welfare, it must find that the Commonwealth of Pennsylvania has departed the constitutional path in this case.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that the Court should note probable jurisdiction to review and reverse the judgment from which this appeal is taken.

Respectfully submitted,

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